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The Eighteenth Amendment and Its Enforcement

Address by WAYNE B. WHEELER, LL. D., at the National Conference, Washington, D. C., September 15, 1920.

The Eighteenth Amendment, and the National Prohibition Enforcement Code to make it operative, will go down in history as the greatest piece of constructive legislation ever adopted by a self-governing people.

A FIXTURE IN THE CONSTITUTION

Prohibition is in the Federal Constitution to stay. It took two-thirds of both Houses of Congress and thirty-six states to submit and ratify the Eighteenth Amendment. Thirty-seven states have now enacted state Prohibition laws. One branch of the Legislature in thirteen states can prevent the repeal of the Eighteenth Amndment. In other words, fewer than 200 State Senators in State Senates in thirteen states can forever prevent the repeal of National Constitutional Prohibition. It will remain in the Constitution as long as the government stands. It can, however, be partly nullified in two ways: First, by the Executive and Judicial Departments of the Government. Second, by the Legislative Department.

The President appoints the Attorney General, who is responsible for the prosecutions in the courts. He also appoints the Secretary of the Treasury, who in turn appoints and is responsible for the Prohibition Commissioner, who represents the Federal Government in the enforcement of Prohibition. The judges may so construe the law, or impose inadequate fines upon law violators that lawbreakers are encouraged, rather than deterred, in unlawful acts.

The Legislative Department of the State and Federal Government may cripple the enforcement of the Eighteenth Amendment by enacting inadequate law enforcement codes, and thus make the enforcement of the Eighteenth Amendment difficult and impracticable.

POWER TO ENFORCE

Section 2 of the Eighteenth Amendment confers concurrent power upon the several states and the Congress to enforce National Prohibition by appropriate legislation. Other amendments to the Constitution simply gave Congress the power to enforce them. For the first time there was written into the Constitution of the United States specific concurrent power to enforce a constitutional provision, or as the court said—"Dealing with the new Prohibition created by the Constitution, operating throughout the length and breadth of the United States, without reference to state lines, it was sought by the second section to unite national and state administrative agencies in giving effect to the amendment and the legislation of Congress enacted to make it completely operative."

WHAT CONCURRENT POWER MEANS

This much discussed phrase never had any irreconcilable meaning in it, except to those who desired to make the Prohibition Amendment inoperative. Concurrent power does not require—

The state to enact the same or any state legislation before the Federal law operates.

It does not require joint action by state and nation. (The court said: "The words 'concurrent power' in that section do not mean joint power, or require that legislation thereunder by Congress, to be effective, shall be approved or sanctioned by the several states or any of them; nor do they mean that the power to enforce is divided between Congress and the several states along the lines which separate or distinguish foreign and interstate commerce from intrastate affairs."

It does not require any further ratification or endorsement by the state to give National Prohibition vitality. The court said: "The power confided to Congress is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."

CONCURRENT POWER MEANS

Equal power by state and nation to carry out the purpose of the Eighteenth Amendment.

It means co-operating, not conflicting or contracurrent power. There can be no conflict when both powers are used as intended. The Supreme Court well said: "It cannot possibly be that Congress and the states entered into the great and important business of amending the Constitution in a matter so vitally concerning all the people solely in order to render governmental action impossible, or if possible, to so define and limit it as to cause it to be productive of no results and to frustrate the obvious intent and general purpose contemplated."

It means equal co-operating power to enforce National Prohibition by appropriate means. The court said: "The second section of the amendment does not enable Congress or the several states to defeat or thwart the Prohibition, but only to enforce it by appropriate means." . . . "Observe also the words of the grant which confines the concurrent power given to legislation appropriate to the purpose of enforcement."

Appropriate legislation to effect the purpose of Prohibition has a well defined meaning. It includes the prevention of the use of intoxicating liquor. Legislative bodies may exercise this power when it is necessary to provide against the evils arising from the traffic. The courts have said repeatedly, "The purpose of legislation to prohibit the manufacture and sale of intoxicating liquors, is to prevent their use." It is clear, therefore, that under concurrent power the state or the Federal government may go as far as it desires in enacting appropriate Prohibition laws and enforcement legislation, that has a reasonable relation to the purpose of the Eighteenth Amendment. Either may exercise its full power to prohibit, but neither can prevent the other from enforcing its legal Prohibition acts and license or permit what the other unit of government prohibits.

Under this power the state or the Federal government may prohibit non-intoxicating liquors because this is necessary in order to bring about the effective enforcement of the Prohibition law, but neither the state nor the Federal government may legalize or permit intoxicating liquors, because the Eighteenth Amendment specially prohibits both the manufacture and sale of all intoxicating beverages:

The court said: "The first section of the amendment binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

Since preparing the above, the Supreme Court of Massachusetts has rendered the following opinion on the meaning of the phrase "concurrent power:"

"The amendment does not require that the exercise of the power by Congress and by the states shall be coterminous, coextensive and coincident. The power is concurrent, that is, it may be given different manifestations directed to the accomplishment of the same general purpose, provided they are not in immediate and hostile collision one with the other. In instances of such collision the state legislation must yield.

"We are of opinion that the word 'concurrent' in this connection means a power continuously existing for efficacious ends to be exerted in support of the main object of the amendment and making

contribution to the same general aim according to the needs of the state even though Congress also has exerted the power reposed in it by the amendment by enacting enforcing legislation operative throughout the extent of its territory. Legislation by the states need not be identical with that of Congress. It cannot authorize that which is forbidden by Congress. But the state need not denounce every act committed within their boundaries which is included within the inhibition of the Volstead act, nor provide the same penalties therefor. It is conceivable also that a state may forbid under penalty acts not prohibited by the acts of Congress. The concurrent power of the states may differ in means adopted provided it is directed to the enforcement of the amendment. Legislation by the several states appropriately designed to enforce the absolute Prohibition declared by the Eighteenth Amendment is not void or inoperative simply because Congress in performance of the duty cast upon it by that amendment has defined and prohibited beverages and has established regulations and penalties concerning them. State statutes, rationally adapted to putting into execution the inexorable mandate against the sale of intoxicating liquors for beverage contained in section 1 of the amendment by different definitions, regulations and penalties from those contained in Volstead act and not in conflict with the terms of the Volstead act but in harmony therewith are valid. Existing laws of that character are not suspended or superseded by the act of Congress. The fact that Congress has enacted legislation covering in general the field of National Prohibition does not exclude the operation of appropriate state legislation directed to the enforcement by different means of Prohibition within the territory of the state.

"The power thus reserved to the states must be put forth in aid of the enforcement and not for the obstruction of the dominant purpose of the amendment. It must not be in direct conflict with the act of Congress in the same field. Subject to these limitations growing out of the nature of our dual system of government, the power of the states is constant, vital, effective and susceptible of continuous exercise. We think that these results follow from the words of the amendment, from the implications of conclusions 8 and 9 of the opinion in Rhode Island v. Palmer, and from the other decisions to which reference has been made."

THE DUTY OF THE FEDERAL GOVERNMENT

The government of the United States has the power and the duty to enforce the provisions of the Constitution. Pursuant to this power and duty Congress enacted the National Prohibition Enforcement Code, known as the Volstead-Sterling act. Practically every provision in it has precedent in more than thirty states which have adopted state Prohibition laws. It represented a new field of legislation only because the Federal government heretofore had never been given power to prohibit the manufacture and sale of intoxicating liquors for beverage purposes. The Congress has accepted the Eighteenth Amendment as a part of the Constitution and has enacted as an initial law one that

is not drastic, but is precedented and necessary if Prohibition is to be made effective throughout the nation. Congress must always bear the responsibility of maintaining an enforceable standard of legislation. If Congress weakens the law so it will be difficult to enforce it, that will encourage the opponents of Prohibition in the doubtful states to repeal their state enforcement laws or prevent the enactment in the few states that have failed to use their power and do their duty. As long as Congress sets the standard of effective enforcement legislation, the law will be fairly well executed in all the states. If Congress fails to maintain the standard, and the wet states repeal or fail to enact state codes, we will have nullification by legislative power. The Eighteenth Amendment makes Prohibition our national policy of government. The nation has the paramount duty resting on it to see that it is enforced. State laws, state constitutions and state derelict officials to the contrary notwithstanding.

THE DUTY OF STATE GOVERNMENT

The state has the same obligation resting upon it to enforce the Eighteenth Amendment within the state that the Federal government has within the nation. The state did not delegate all of its power to the Federal government to prohibit the liquor traffic or to enforce the laws. It retained all of its former power for itself and gave to the nation equal power to aid the states in carrying out a power which was originally within the states. It is given power for the first time to enforce a Federal Prohibition law. In some respects the state has a greater moral obligation to enforce the Eighteenth Amendment within its borders than the Federal government. The state has a larger number of officers whose duty it is to enforce criminal laws. The Eighteenth Amendment does not take away from them the power to enforce Prohibition laws. The state legislatures have the authority to enact Prohibition laws which must be enforced by state officers.

Because of the larger number of these officers and the long standing precedent that it is their duty to enforce these state laws, they should be held to the same standard of public duty concerning the enforcement of the Eighteenth Amendment as to the state laws. Each state, therefore, should speedily enact a state Prohibition enforcement code.

NECESSITY FOR STATE ENFORCEMENT CODES

Unless the state adopts a Prohibition enforcement code its state officers have no power to exercise final jurisdiction in the enforcement of Prohibition laws. Federal laws are enforced by Federal officers. State officers are authorized under Section 1014 of the Revised Statutes of the United States to arrest Federal law violators and bind them over to the Federal Court. They do not, however, have power to try them and impose penalties upon such violators. The few remaining states that have

not yet enacted state Prohibition codes are failing to use their power or perform their duty under Section 2 of the Eighteenth Amendment.

REASONS WHY STATES SHOULD ENACT PROHIBITION CODES

Without a state enforcement code the state will lose all of the fines and forfeited bonds arising from the enforcement of the law. Failure to adopt a state enforcement code encourages lawlessness within the state. The uninformed believe that they have a right to sell such liquors as are not prohibited by state laws. By so doing they violate the Federal law and will be penalized therefore.

The state by failing to adopt a state enforcement code will make the trial of offenders unnecessarily burdensome. These offenders can be tried only in the Federal Court, if there is no state code. Federal Courts are often far from the place where the violation occurs and the defendant often awaits trial for months in jail if a bond cannot be secured. It is unfair to the defendant, burdensome to the Federal government, and unpatriotic, not to provide adequate law enforcement machinery to sustain the Constitution of the United States.

HARMONIZING STATE AND FEDERAL LAWS

The importance of having the state and Federal Prohibition laws standardized on the main points cannot be over-estimated. Different standards of Prohibition lead to confusion and conflict. If the state law has a weaker standard than the Federal Government, many people think they are obeying the law when they comply with state statutes. On the other hand, if the Federal law is more lax than the state law, it is liable to mislead many into the belief that if they comply with the Federal law to enforce a national constitutional provision, that they are within the law. We have many conflicts now between Federal and state laws, the fish and game laws, liquor revenue and tax laws, and many others. In many states the state law prohibits the sale or prescribing of liquor for medicinal purposes. The Federal law recognizes the right to do this. In some states physicians are not required to secure permits for issuing prescriptions. The Federal law requires them. Transportation companies are required to keep records of their shipments under the Federal law. In some states there is no such requirement. These are but a few of the many provisions which for a time will cause some confusion in the enforcement of the Prohibition law. The states with weak law enforcement standards will get a larger benefit from the enforcement of National Prohibition if they will secure the enactment of laws in practical harmony with the main features of the National Prohibition Code. On the other hand, the Federal Code might well be strengthened to conform to the tried standards of effective state codes.

RELATION OF THE ANTI-SALOON LEAGUE TO ENFORCEMENT OF THE EIGHTEENTH AMENDMENT

The Anti-Saloon League and other civic bodies are not called upon to act as detective agencies or policemen to secure the enforcement of the Eighteenth Amendment. There are certain important duties, however, which they can perform. The first essential to law enforcement is the securing and maintaining of enforceable state and Federal law enforcement codes. The Anti-Saloon League will have to be on guard many years to prevent the election of a Congress and State Legislatures that will amend or repeal the enforcement codes and thus nullify the Eighteenth Amendment. Another essential to effective enforcement is a strong public sentiment favorable to the law and its operation. The wet propaganda is being circulated by many new national anti-Prohibition organizations—the Association Opposed to National Prohibitions, the Association Opposed to the Prohibition Amendment, the National Order of Camels, and the National Constitutional Personal Liberty League. In addition a number of other organizations like the Goodfellows of America are at work to create a hostile public sentiment and make the enforcement of the law more difficult. This must be offset by a great campaign in favor of law and order. If a few liquor dealers can nullify the Eighteenth Amendment by these methods it encourages lawlessness throughout the nation. When law is gone and its enforcement, all is gone in orderly government. The issue has resolved itself into one of loyalty to the Constitution and to the Government itself. While private citizens are not required to do police duty, they are obligated to aid the officers of the law by giving them information concerning violations of law, encouraging these officers when they do right and protesting against them when they are derelict. The National Prohibition Enforcement Commission, with about $4,000,000 appropriated annually, can and will bring about the enforcement of the Eighteenth Amendment if they are given proper co-operation by the government itself and by individual citizens. It may be necessary to appropriate more than has been given this department for this work. If it is necessary, we should insist upon the added appropriation. Government officials can get larger results with the added power given to them as officials, with a much smaller amount of money than individuals who attempt to operate without official sanction. Public officials whose duty it is to enforce the law must be elected and supported to carry out their oath of office and promises to support the Constitution of the United States. The Supreme Court held:

“The first section of the Amendment . . . binds all legislative bodies, courts, public officers and individuals within those limits.” . . .

Any public official, from the President down to a justice of the peace or magistrate, should be held to accountability to that oath. An officer who takes an oath of office to enforce the law and is paid for that work and refuses to do it, should be treated as any other derelict official and be removed from office. This can be done by the people when derelict officials come up for re-election, and by securing the enactment of laws to remove such useless officials when they fail to do their duty.

Organized effort on the part of state Leagues through the national organization will bring about the complete and effective enforcement of the Eighteenth Amendment.

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